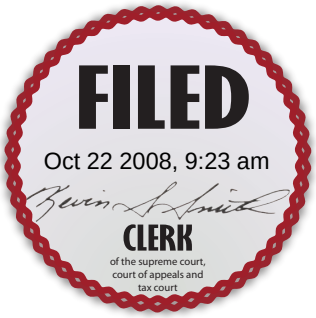

ATTORNEY FOR APPELLANT:

EDWARD R. HALL
Merrillville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CASH IN A FLASH, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A05-0804-CV-256
	)	
ANNE DEFREEUW,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Richard McCormick, Magistrate
Cause No. 71D01-0503-SC-2826

October 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Cash in a Flash, Inc. ("CIF") appeals the trial court's judgment awarding CIF $1,195, plus costs, in CIF's action against Anne DeFreeuw for defrauding a financial institution. CIF raises two issues for our review, but we address only the following dispositive issue: whether CIF invited the purported errors from which it appeals.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 14, 2004, DeFreeuw applied for a $200 loan from CIF. The terms of the loan required DeFreeuw to pay back $225 in two weeks, or an annual interest rate of 325.89%. As "security" for the loan, DeFreeuw wrote a $225 check to CIF, dated for June 28, which she submitted with her application. See Appellant's App. at 56. Also on that application, DeFreeuw checked a box that stated that she had no other outstanding payday loans. On June 28, DeFreeuw's post-dated check bounced.

After numerous attempts at collection, CIF filed a small claims action against DeFreeuw on March 16, 2005. In its complaint, CIF alleged as follows: Count I, defrauding a financial institution; "Count II (Alternative Cause of Action)[,] . . . penalties for stopping payments" under Title 26 of the Indiana Code; and "Count III (Alternative Cause of Action)[,] breach of contract." Id. at 62-63 (capitalization removed). Under Count I, CIF sought $1,268.96, inclusive of costs, and under Count II and Count III CIF sought additional sums.

On September 13, 2007, the trial court held a hearing on CIF's complaint. At that hearing, the following exchanges took place:

> Q [by CIF's counsel] If you knew that some of this information [in DeFreeuw's application] was false would you make the loan?
>
> A [by CIF's president] No.
>
> Q What were the requirements at the time with respect to how much of a loan you could make to a person or how many loans they could have in terms of pay day loans?
>
> * * *
>
> A The customer could not have more than two pay day loans.
>
> Q Or a total of?
>
> A $500.
>
> * * *
>
> Q [to DeFreeuw] The check in this case was dated June 28th of '04. Now, for Direct Cash[, another small-loan lender to DeFreeuw,] to have written a loan off of $644 on July 6th . . . [the] loan would have to predate [CIF's] loan by at least 90 days. Go back. How can your answer to the question that says you have no outstanding loans be true?
>
> A [by DeFreeuw] I guess because I didn't even remember. You can have up to two. Maybe this one and that one made two.
>
> Q Well, ma'am, you can have—
>
> A Up to three maybe.
>
> Q Actually you can only have up to $500 [in] pay day loans and this one was $644?
>
> A They shouldn't have given it to me then.

* * *

MR. HALL [CIF's counsel, to the court]: We're asking for a finding of fraud in that she actually lied on her application by stating that she had no other outstanding pay day loans when, in fact, she did. The testimony through my client indicates that had he known she had a $644 outstanding loan at the time she applied for this one he could not by law lend her this money. But at the time the statute says that pay day lenders can rely on the representations of the borrower. Now, that has since changed as of 2005. We now have to rely on this database which was not in existence at the time.[1]

* * *

THE COURT: Is there a case out there that says you have to make [an] election between the contract and fraud theor[ies?]

MR. HALL: On her defrauding a financial institution or Title 26. Both of which fall in there, yeah. You have to make the election.

THE COURT: And you're only entitled to the damages [on] the lesser of the two?

MR. HALL: That's correct.

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[1] Since its enactment in 2002, Indiana Code Section 24-4.5-7-404(3) has required small-loan lenders to:

> independently verif[y] the accuracy of the consumer's written representation through commercially reasonable means. A lender's method of verifying whether a consumer has any outstanding small loans will be considered commercially reasonable if the method includes a manual investigation or an electronic query of:
>
> (a) the lender's own records, including both records maintained at the location where the consumer is applying for the transaction and records maintained at other locations within the state that are owned and operated by the lender; and
>
> (b) available department approved databases.

(Emphases added.) However, the Department of Financial Institutions did not act to approve a database until 2005. See Letter from Department of Financial Institutions to Small Loan Licensee (July 6, 2005), available at http://www.in.gov/dfi/Cover_Letter_SLA_DATABASE.pdf (last visited October 1, 2008).

Id. at 14, 25-27, 34.

On January 28, 2008, the trial court entered judgment in favor of CIF on Count I and ordered DeFreeuw to pay to CIF $1,195 plus costs. Specifically, the court found that DeFreeuw "provided false information o[n] her loan application when she failed to disclose to Plaintiff other outstanding payday loans." Id. at 2. CIF now appeals.

DISCUSSION AND DECISION

Judgments in small claims actions are subject to review as prescribed by relevant Indiana rules and statutes. Cash in a Flash, Inc. v. McCullough, 853 N.E.2d 533, 537 (Ind. Ct. App. 2006) (citing Counceller v. Ecenbarger, Inc., 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005)). When reviewing claims tried by the bench without a jury, the reviewing court shall not set aside the judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Id. In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id. A deferential standard of review is particularly important in small claims actions, where trials are informal and have the sole objective of dispensing speedy justice between the parties according to the rules of substantive law. Id. (citing Hill v. Davis, 832 N.E.2d 544, 548 (Ind. Ct. App. 2005)).

We also note that DeFreeuw did not file an appellee's brief in this appeal. Accordingly, we do not undertake the burden of developing arguments for the appellee,

as that duty remains with her. State v. Black (In re M.M.B.), 877 N.E.2d 1239, 1242 (Ind. Ct. App. 2007). When the appellee does not file a brief, we apply a less stringent standard of review and may reverse the trial court when the appellant establishes prima facie error. Id. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." Id.

Here, CIF states the issues raised on appeal as follows: (1) whether it is "entitled to receive the stated interest of the loan agreement under a properly pleaded breach of contract count in addition to the 'enhanced damages' allowed under the Indiana Bad Check Statutes for the post-dated check"; and (2) whether the trial court abused its discretion "by not enforcing the terms of the loan contract . . . under count III (Breach of Contract) of the complaint." Appellant's Brief at 1. That is, CIF argues that, in addition to statutory treble damages and attorney's fees, which the trial court awarded, CIF is entitled to consequential damages for breach of contract in the amount of unpaid interest on the loan. CIF contends that, "this issue is one of first impression and one that needs direction from the Court of Appeals as to the propriety of awarding contractual damages as well as enhanced damages when properly plead and proven as separate counts." Id. at 3 n.2. But we need not address those issues, because if there was any error in the trial court's judgment that error was invited by CIF.

The doctrine of invited error is grounded in estoppel. Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). Under this doctrine, "'a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or

misconduct.'" Id. (quoting Witte v. Mundy, 820 N.E.2d 128, 133-34 (Ind. 2005)). The record here indicates that CIF, in its complaint, alleged three counts against DeFreeuw, but that Count II (penalties for stopping payment) and Count III (breach of contract) were explicitly alleged as "Alternative Cause[s] of Action" to Count I (defrauding a financial institution). Appellant's App. at 67-68. Further, at the small claims hearing, CIF's counsel expressly informed the trial court that it had to "elect[] between the contract and fraud theor[ies]" and that the court could only award to CIF "damages [on] the lesser of the two" allegations. Id. at 34. That is what the court did. Hence, if that was error, CIF invited that error and "it cannot not take advantage of that error on appeal." Wright, 828 N.E.2d at 907.

Affirmed.

ROBB, J., and MAY, J., concur.